

MEMORANDUM OF LAW

DATE: August 7, 1995

TO: Karen Scarborough, Assistant to the Mayor for Public Resources

FROM: City Attorney

SUBJECT: Municipal Ordinance Governing Effluent Discharge Standards

By way of introduction, this office had prepared an ordinance at your request to mandate municipal ocean monitoring of sewer discharges. You request whether this ordinance can be expanded to include discharge effluent standards of "80% TSS . . . and to not less than 58% of BOD"

The ordinance may not be expanded to include specific discharge standards as such an ordinance would conflict with federal law and hence be void under the Supremacy Clause, Article VI, clause 2 of the U.S. Constitution. Our reasoning follows.

Federal law preempts or prohibits local ordinances where Congress has legislated so comprehensively that the federal law occupies the field or such a local ordinance conflicts with federal law. *United States v. City of Hayward*, 805 F. Supp. 811 (N.D. Cal. 1992). The federal Clean Water Act, 33 U.S.C. 1251 et seq., establishes a comprehensive scheme of regulations and restrictions for the discharge of any pollutant. As they pertain to owners of publicly owned treatment works (POTW's), such discharges are required to comply with effluent limitations which are based on "secondary treatment," a method of treatment to biologically degrade waste. The regulations and restrictions are enforced through a federally authorized national pollution discharge elimination system (NPDES) permit. 33 U.S.C. 1342.

Compliance with secondary treatment means compliance with effluent limitations defined at 40 C.F.R. 133.102 for biochemical oxygen demand (BOD), total suspended solids (TSS), and pH (acidity). The minimum level of BOD is 30 mg/L and not less than 85 percent removal, TSS is 30 mg/L and not less than 85 percent removal, and pH must be maintained within 6.0 and 9.0.

The requested ordinance seeks to set effluent standards at 58% (BOD) and 80% (TSS), which are a priori below the minimum levels established by the Clean Water Act. While such standards are referenced in the Clean Water Act, they are referenced only at section 301(j)(5),

which provides for an extension of time within which the City of San Diego may apply for a modified NPDES permit. In providing for the extension, Congress imposed "additional conditions" which included the 58% (BOD) and 80% (TSS) standard as minimum conditions of applying for and granting a modification under section 301(h). Such minimum conditions for granting a modified NPDES permit under section 301(h) are wholly distinct from the comprehensive standards in that a modified NPDES permit must be reapplied for every five (5) years. 33 U.S.C. 1311(m).

Accordingly, any municipal ordinance that seeks to impose effluent quality standards in the federally comprehensively legislated field of effluent quality and in conflict with the statutory minimum levels of effluent quality would be preempted as contrary to the federal purposes and objectives of the Clean Water Act. *United States v. City of Hayward*, 805 F. Supp. at 813 (N.D. Cal. 1992).

While similar concerns could be raised concerning state mandates over bioassay protocols and chemical testing methods (California Water Code section 13170.2), we think a charter city has appropriate regulatory authority over ocean monitoring and the frequency of reporting. *Johnson v. Bradley*, 4 Cal. 4th 389, 399 (1992). Since the drafted ocean monitoring ordinance presents no actual conflict between local and statewide laws, it is a permissible ordinance for a charter city.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:mb:450(x043.2)

Attachment:Revised

Monitoring Ordinance

ML-95-54